of said testimony and rules is conflicting, and the entire question appears to have been governed by a labor agreement between Respondent and its employees. Respondent, in whose possession the labor agreement reposed, declined to produce said agreement or offer it in evidence (R. 91, 92, 141, 142).

B.

JURISDICTIONAL STATEMENT.

Petitioner seeks a review by certiorari, pursuant to Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925 [43 Stat. 937; U. S. C. Tit. 28, Sec. 334 (b)], of a final judgment of the Court of Appeals of Maryland, the highest Court of said State, rendered and passed in this case on December 18, 1940. The case concerns the question of whether the remedy of Petitioner and her infant children for the recovery of compensation for the accidental death of her husband, the father of said infants, is pursuant to the Maryland Workmen's Compensation Act (Code of P. G. L. of Md., 1939, Article 101), under which Petitioner proceeded, or the Federal Employers' Liability Act of 1908 (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, *et seq.*), which was invoked by Respondent, The Pennsylvania Railroad Company, employer of deceased, in defense to the claim for compensation and in denial of State jurisdiction. The Federal questions sought to be reviewed were raised by Respondent before the State Industrial Accident Commission of Maryland, before which body Petitioner's claim for compensation initially was filed, by filing in writing (R. 4), preceding the taking of testimony, an issue as to whether deceased was engaged in interstate commerce when injured. From an adverse ruling by the Commission on that issue (R. 9), Petitioner filed an appeal to the Superior Court of Baltimore City, and an election for a jury trial, where the Federal questions again were raised by written issues (R. 3) filed before trial, and by prayers or requests for instructions at the conclusion of the evidence (R. 144-147). Exceptions to adverse rulings

on said prayers were duly noted by the parties (R. 144). The verdict and findings of the jury being favorable to Petitioner (R. 5), resulting in a judgment of reversal of the award of the Commission in favor of Respondent, an appeal was filed by Respondent to the Court of Appeals of Maryland where the Federal questions, duly presented and reserved in the record by bills of exceptions, were raised and argued in the briefs of the parties and orally before said Court. The Court of Appeals of Maryland, which decided the Federal questions adversely to Petitioner, sustained the rights, privileges and immunities specially set up and claimed by Respondent under the Federal Act.

For cases believed to sustain the jurisdiction of this Court, and to show that the questions here presented are Federal questions of substance, see, *e. g., Chicago, R. I. & P. Ry. Co. v. Devine,* 239 U. S. 52, 54; *Industrial Accident Comm. v. Davis,* 259 U. S. 182; *Toledo, St. Louis & West. R. R. Co. v. Slavin,* 236 U. S. 454; *Seaboard Air Line Ry. v. Padgett,* 236 U. S. 668; *Kinzell v. Chicago, M. & St. P. Ry. Co.,* 250 U. S. 130; *Southern Pac. Co. v. Industrial Acci. Comm.,* 251 U. S. 259.

C.

THE QUESTIONS PRESENTED.

(1) Were deceased and Respondent, at the time of the injuries resulting in his death, as a matter of law engaged in interstate transportation within the meaning of the Federal Employers' Liability Act?

(2) Was the question of whether deceased and Respondent were, at the time of the injuries resulting in his death, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act properly a question for the jury?

(3) Did Respondent meet and satisfy the burden of proof upon it to show that it and deceased, at the time of the injuries resulting in his death, were engaged in inter-

state transportation within the meaning of the Federal Employers' Liability Act so as to justify the Court below, upon the testimony and evidence in the record, in holding as a matter of law, as it did, that the remedy afforded by the Federal Act is paramount and exclusive in this case, and that the tribunals of the State are without jurisdiction to hear and determine Petitioner's claim for compensation for the death of deceased, her husband?

(4) Was the Court below justified in reversing without a new trial the judgment of the trial Court on the verdict and findings of the jury that deceased, when injured, was engaged in intrastate work clearly separable and distinguishable from the interstate transportation he previously had been engaged in, and in holding, as a matter of law, that deceased when injured was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, and that the trial Court erred in not instructing the jury as a matter of law that deceased was engaged in interstate "commerce" at the time of his death, where the evidence shows, as the jury found, that prior to receiving his injuries deceased and the instrumentalities of Respondent upon which he was in attendance had previously been completely and finally separated and withdrawn from interstate transportation?

(5) Was the Court below justified in reversing without a new trial the judgment of the trial Court and in holding, as a matter of law, that deceased when injured was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, when the conclusions of the Court below were based on findings as to the nature of the removed shipment of ore rather than as to the nature of the activities of deceased and Respondent at the time of the injuries and with relation to the road engine and tender, and where the evidence shows that when deceased was injured both he and the engine and tender had previously been completely and finally removed, separated and withdrawn from said shipment of ore which, with the

waybills for it, had been taken in charge by another engine and crew?

(6) Was the Court below justified in reversing without a new trial the judgment of the trial Court and in holding, as a matter of law, that deceased when injured was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, when the conclusions of the Court below were based on the finding that deceased, when injured, was in an activity or service in itself only reasonably incident to interstate transportation or merely connected with another activity or service which, in turn, had previously been involved in forwarding an interstate shipment, and where the evidence shows, as the jury found, that when deceased was injured both he and the instrumentalities upon which he was in attendance had previously been completely and finally separated and withdrawn from all interstate transportation?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals of Maryland has decided a Federal question of substance in a way not in accord with applicable decisions of this Honorable Court in several important and serious respects. In holding as a matter of law that a deceased employee of an intrastate and interstate carrier by railroad was, when injured, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, and in reversing the judgment of the trial Court on the verdict and findings of a jury that said deceased, when injured, was engaged in intrastate work clearly separable and distinguishable from the interstate transportation in which he previously had been engaged, the Court below departed from and erroneously applied the fixed rule of this Court, evolved from the settled construction of said Federal Act, that in order for said Federal Act to be applicable, and State jurisdiction to be

displaced, the employing railroad must affirmatively show that at the time of the injuries both it and its employee were engaged in interstate transportation or in work so closely related to it as to be a part of it.

2. Under applicable decisions of this Court, involving the Federal Act, it has consistently been held that the activities of the parties at the time of the injury with relation to the particular instrumentalities then involved or in use by them are the determinative factors as to applicability of the Federal Act, yet the Court below, citing and relying upon tax cases not involving said Federal Act, selected as the determinative factor in this case the nature of a shipment of ore from which, as the evidence shows and as the jury in the trial Court found, deceased and Respondent's instrumentalities upon which he was in attendance had previously been completely and finally separated and withdrawn. The undisputed evidence shows that the shipment of ore, together with the waybills therefor, had been, previous to the time of the injuries, delivered to and taken in charge by another engine and its crew.

3. Contrary to express holdings of this Court, and to the presumption against Federal and in favor of State jurisdiction in these cases, the Court below, in effect, proceeded and relied upon an assumption that unless the evidence affirmatively established that deceased was within the State Act the Federal Act applied, and held as a matter of law that, under the testimony and evidence in the record, the remedy under the Federal Act is paramount and exclusive in this case. In so doing the Court below missed or disregarded substantial evidence in the record that abundantly shows, as the jury actually found, that deceased when injured was engaged in intrastate work. The Court below failed to extend to Petitioner the rule of this Court that, in the circumstances present, she was entitled to the benefit of all evidence and inferences favorable to her; and, moreover, in holding that the issue of transportation was not a proper one for the jury, the Court

below departed from the general rule of this Court, invoked and applied by it in parallel cases and under similar circumstances, that such issue is, when facts or inferences are disputed or contradicted or uncertain, a question of fact, or a mixed question of law and fact, and thus rightfully for the jury to determine.

4. Without any sanction in the applicable decisions of this Court, as far as Petitioner has been able to ascertain, the Court below, in holding the State Act to be inapplicable, adopted and followed a theory that, if sound, which is denied most particularly by Petitioner, would result in practically every employee of an interstate carrier by railroad being embraced within the operation of the Federal Act and the termination of State jurisdiction altogether. The Court below said on this point: (R. 88) "Thus the service in which the brakeman *had been and was employed* at the time was primarily in forwarding of interstate commerce, and that the mode of this *connected service at the time of the accident was a reasonable incident or contingency* of the completeness of the service". That conclusion would seem to mean that when injuries occur to an employee while in an activity or service that is itself not in interstate transportation but only reasonably incident to it, or merely connected with another activity or service which, in turn, may have previously been involved in interstate transportation, the Federal Act applies. But such a theory utterly conflicts with the Federal Act and its construction by this Court which provide and hold that, for the Federal Act to apply, there must be shown to exist as regards the particular activity or service of the employee and the railroad a real, substantial, close or direct relation to or affect upon interstate transportation.

5. The Court below assumed, contrary to applicable decisions of this Court, as well as in disregard of the evidence and rational inferences of which it was susceptible, that because the instrumentalities upon which deceased

was in attendance when injured had previously been employed in interstate commerce they still retained interstate characteristics at the time of the injuries, although the undisputed evidence shows that said instrumentalities had been completely and finally separated and withdrawn from their previous service.

6. In total disregard of the most recent pronouncements of this Honorable Court drawing a clear distinction between the meaning of the words "commerce" and "transportation" in cases of this kind, the Court below held that the trial Court erred in refusing to grant Respondent's written demurrer prayer which was that the trial Court rule, as a matter of law, that deceased was engaged in interstate "commerce" at the time of his death. Respondent's said prayer was obviously predicated on the theory that if deceased, when he died, was in interstate "commerce", the State Courts are without jurisdiction to hear and determine the claim for compensation; whereas the correct rule of this Court is that for the Federal Act to apply there must be a showing that when injuries occur the employee is in interstate "transportation", or in work so closely related to it as to be practically a part of it, which has a narrower signification than "commerce". For that reason, also, the Court below was in error in holding that Respondent's said prayer should have been granted.

WHEREFORE, Your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of all proceedings in the case entitled and numbered on its docket, "The Pennsylvania Railroad Company, employer and self-insurer, v. Elva Mae Reeley, widow, and on behalf of the three infant children of the late George A. Reeley, deceased, No. 5, October Term, 1940," and that the said judgment of the Court of Appeals of

Maryland may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

AND your Petitioner will ever pray, etc.

ISAAC LOBE STRAUS,
Counsel for Petitioner.

AVRUM K. RIFMAN,
Of Counsel.

Baltimore, Maryland,
February 10, 1941.